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NOV 15 1983
ALEXANDER L. STEVAS,
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No. 83-124

In the Supreme Court of the United States

OCTOBER TERM, 1983

NUNZIATO FUSARO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner's indictment charging violations of 18 U.S.C. 1005 adequately alleged that petitioner acted with intent to injure or defraud.

2. Whether, after the district court conducted a hearing and determined that a conversation between the jury foreman and an FBI agent who was not involved in petitioner's case did not result in any prejudice, the court should also have examined the juror despite petitioner's failure to request such an examination.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A16) is reported at 708 F.2d 17.

JURISDICTION

The judgment of the court of appeals (Pet. App. B1) was entered on May 26, 1983. The petition for a writ of certiorari was filed on July 21, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Massachusetts, petitioner was convicted on 15 counts of misapplication of bank funds (18 U.S.C. 656), six counts of issuing unauthorized checks (18 U.S.C. 1005), four counts of making false entries in a bank statement (18 U.S.C. 1005), ten counts of making false statements for the purpose of influencing action on bank loans

(18 U.S.C. 1014), and one count of conspiracy (18 U.S.C. 371).[1] He was sentenced to concurrent terms of three years' imprisonment, with all but 30 days suspended in favor of probation, and fines totaling $40,000. The court of appeals affirmed (Pet. App. A1-A16).

1. The evidence at trial showed that in late 1979 and early 1980 petitioner—along with co-defendants Richard Saccone and Richard Robidoux—fraudulently arranged over $600,000 in loans to Robidoux from the Mohawk Trust and Savings Bank, a small bank in Greenfield, Massachusetts. Saccone was president of the bank. Petitioner is an attorney who represented both the bank and Robidoux, who owned an automobile dealership. Robidoux's business was in serious financial trouble. Although Mohawk was capitalized at only $300,000 and could lend not more than $60,000 to any person, petitioner and Saccone managed to lend more than ten times that amount to Robidoux. The loans were made without the approval of the bank's executive committee. The financial bleeding of Mohawk by petitioner and his co-defendants took only three months. The bank was closed in February 1980, and a Federal Deposit Insurance Corporation liquidator took over. Pet. App. A2-A5.

2. At trial, petitioner claimed that the Section 1005 counts in the indictment were deficient because they did not allege that he acted with intent to injure or defraud the bank. The district court rejected that claim, but instructed the jury that it had to find that petitioner intended to injure or defraud the bank in order to convict him under paragraph one of Section 1005 (Pet. 5 n.6). On appeal, petitioner renewed his claim that the indictment was defective because it failed to allege intent. The court of appeals held that because the indictment tracked the language of the statute,

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[1] Petitioner was acquitted on three counts of improper receipt of a commission for procuring a loan (18 U.S.C. 215).

described the offense with sufficient clarity to show a violation of the law, and enabled petitioner to know the nature of the charge against him, it was sufficient (Pet. A9). The court found in any event that any error in the indictment was harmless since the trial court instructed the jury that it must find an intent to injure or defraud in order to convict petitioner (*ibid.*).

On the second day of trial an FBI agent who was not involved in this case met the foreman of petitioner's jury in the hall of the courthouse. They recognized one another from a woodworking class, and talked for five minutes. The conversation did not refer to the trial. When the FBI agent learned of the juror's status, he avoided further contact with him. (Pet. App. A10-A11).

The conversation was brought to the court's attention, and the trial judge questioned the agent thoroughly with petitioner's counsel present. The court found that no prejudice had occurred, and petitioner's counsel agreed. A short time later, however, after consulting with his client, petitioner's counsel moved to excuse the foreman. He did not request a voir dire of the foreman. The district court denied the motion. The court of appeals upheld this action, finding no abuse of discretion in the trial court's ruling that the encounter was harmless. (Pet. App. A11).

ARGUMENT

1. Petitioner contends (Pet. 6-11) that intent to injure or defraud is an element of an offense under paragraph two of 18 U.S.C. 1005[2] and that his conviction must be reversed

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[2]In fact, the district court charged the jury under paragraph one of 18 U.S.C. 1005 (Pet. 5 n.6), and the court of appeals concluded that it was that paragraph that petitioner was convicted under (Pet. App. A2). The indictment charged that Saccone, "being an officer and director of Mohawk," and aided by petitioner and Robidoux, issued "drafts and orders of Mohawk, in the form of Mohawk Treasurer's checks" (C.A. App. 16). The first quoted phrase is relevant only to paragraph one of

because the indictment failed to allege such intent.[3] He argues that by affirming his convictions, the court of appeals has decided that intent to defraud is not an element under paragraph two of Section 1005, and that its decision conflicts with decisions of the Second and Ninth Circuits. These claims are without merit. Even if intent to injure or defraud is an element of all Section 1005 violations—a matter on which the court of appeals expressed no opinion—the indictment sufficiently alleged the requisite intent and the trial court instructed the jury that it must find such intent. Thus petitioner's convictions cannot be affected no matter how the question about intent is ultimately resolved.

Although paragraph three of 18 U.S.C. 1005 specifically requires an "intent to injure or defraud" a bank, neither of the first two paragraphs mentions that element. The Ninth Circuit has nevertheless held that intent to injure or defraud is an essential element under all three paragraphs of Section 1005. *United States* v. *Pollack*, 503 F.2d 87, 90 (9th Cir. 1974). The Second Circuit has come to the same conclusion concerning 18 U.S.C. 656—a different, but related, statute. *United States* v. *Docherty*, 468 F.2d 989 (2d Cir. 1972). See also *Ramirez* v. *United States*, 318 F.2d 155, 157-158 (9th

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Section 1005; the second seems to refer to paragraph two of Section 1005. Since violations of paragraph one are also covered by paragraph two, however, and since petitioner's claim about intent to injure or defraud seems equally applicable to both sections (Pet. 4 n.2), we do not think the difference is significant.

[3]We note that this contention relates to only six of the 36 counts on which petitioner was convicted. Since he received concurrent jail and probationary terms on all counts, all that is at stake with respect to this issue is $6,000 out of the total of $40,000 in fines to which he was sentenced.

Cir. 1963) (18 U.S.C. 656).[4] In this case the court of appeals concluded that petitioner's "objection to the indictment affords us no opportunity to decide the section 1005 intent issue" (Pet. App. A9).

Given the language of the indictment, that conclusion was proper. Counts 19-24 not only tracked the language of Section 1005[5] but also, as the court of appeals noted, "described [the offense] with sufficient clarity to show a

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[4]In *Harrison* v. *United States*, 279 F.2d 19 (5th Cir.), cert. denied, 364 U.S. 864 (1960), the Fifth Circuit stated that intent to injure or defraud is not an essential element of offenses under the first two paragraphs of 18 U.S.C. 1005. 279 F.2d at 23. The court noted, though, that Harrison's indictment charged an intent to defraud (*ibid.*), and that "there was ample evidence from which the jury could find the necessary • • • ingredient of the crime" (*id.* at 24). More recent Fifth Circuit cases suggest that the court may be inclined to reconsider its statements in *Harrison*. See *United States* v. *Mann*, 517 F.2d 259, 267 (1975), cert. denied, 423 U.S. 1087 (1976); *United States* v. *Tidwell*, 559 F.2d 262, 267 (1977), cert. denied, 435 U.S. 942 (1978).

[5]In relevant part, the indictment stated (C.A. App. 16):

COUNTS NINETEEN THROUGH TWENTY-FOUR

On or about the dates hereinafter set forth in these counts, Counts Nineteen through Twenty-Four, in the District of Massachusetts, Richard Saccone, being an officer and director of Mohawk, the deposits of which were insured by the F.D.I.C., and Nunziato Fusaro and Richard E. Robidoux, the defendants, aided and abetted by each other, did knowingly, unlawfully and willfully, without authority from the directors of Mohawk, issue, and cause to be issued, drafts and orders of Mohawk, in the form of Mohawk Treasurer's checks, as further described hereinafter in these counts, Counts Nineteen through Twenty-Four.

COUNT	DATE	PAYEE	AMOUNT
19	11/2/79	United Chevrolet, Inc.	$50,000.00
20	11/2/79	Richard E. Robidoux	$50,000.00
21	11/5/79	Irving Heller	$50,000.00
22	11/5/79	Dr. Anthony Micelotti	$50,000.00
23	11/6/79	Bernard Quitt	$50,000.00
24	11/6/79	Richard Ricciardi	$50,000.00

violation of law, and enable[d petitioner] to know the nature and cause of the accusation against him and to plead an acquittal or conviction in bar of future prosecution for the same offense" (Pet. App. A9). See *Hamling* v. *United States*, 418 U.S. 87, 117 (1974).

Petitioner argues that tracking the language of the statute is insufficient here, since the codified version of the statute has erroneously omitted the phrase "intent to injure or defraud" (Pet. 5 & n.3, 7-8). But even if that is so—a matter which we do not concede—in this case the indictment *did* state that petitioner had acted "knowingly, unlawfully and willfully," terms that are well understood to signify an evil intent or mental culpability. See *Morissette* v. *United States*, 342 U.S. 246, 264 (1952); *United States* v. *Pomponio*, 429 U.S. 10, 12 (1976); *United States* v. *Murdock*, 290 U.S. 389, 394-395 (1933); *United States* v. *Kent*, 608 F.2d 542, 545 n.3 (5th Cir. 1979), cert. denied, 446 U.S. 936 (1980).[6] In determining whether an essential element of an

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[6]Nor is there any doubt here that the grand jury—in describing the issuance of the bank's checks as having been done not only without authority from the directors, but also "knowingly, unlawfully and willfully" — considered and meant to address the element of intent to defraud. In stating counts 5-8—which charged violations of 18 U.S.C. 656 in connection with the issuance of checks to Heller, Micelotti, Quitt, and Ricciardi (cf. counts 21-24, note 5 *supra*)—the grand jury concluded that (C.A. App. 15):

> Saccone [aided and abetted by petitioner] caused the issuance of Mohawk Treasurer's check[s] * * * in the names set forth * * *, knowing and concealing from the bank the fact that the monies * * * were intended for the use and benefit of defendant Robidoux and the obligation to repay was concentrated in Robidoux, falsely creating the appearance that the monies and funds had been disbursed to, and the obligation to repay existed in, the individuals named hereinafter; when in fact the nominal recipients of the monies * * * had neither requested, nor received said monies and funds and had not obligated themselves to repay said monies and funds, whereby the safety and soundness of Mohawk stockholder and depositor funds and monies was jeopardized, and said monies and funds were depleted and lost to said bank.

offense has been omitted, it is not necessary that any particular word or phrase appear. The indictment may be phrased in any form which substantially states the element. *Hagner* v. *United States*, 285 U.S. 427, 433 (1932). For example in *Ramirez* v. *United States*, 318 F.2d at 158, the Ninth Circuit held the indictment under 18 U.S.C. 856 to be sufficient despite its failure to use the phrase "an intent to injure and defraud," since the phrase "did wilfully misapply" adequately encompassed the necessary intent element. See also *United States* v. *Moraites*, 456 F.2d 435, 440-441 n.9 (3d Cir.), cert. denied, 409 U.S. 891 (1972) (18 U.S.C. 656).[7]

2. Petitioner also argues (Pet. 11-14) that his conviction should be reversed because the trial court failed to examine the jury foreman after that individual's brief conversation with an FBI agent. This claim is without merit. Petitioner

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The statement of counts 19-24 immediately follows this recital (C.A. App. 16). In addition, the statement of count 1 (conspiracy) shows that the grand jury was fully cognizant of the specific objective which counts 19-24 charged petitioner with pursuing (C.A. App. 9):

> In early November of 1979, defendants, Robidoux, Fusaro, and Saccone * * * did form a plan to channel a total of $720,000.00 of Mohawk funds to Richard Robidoux and his interests through a series of unsecured nominee loans so as to create the appearance that the loans did not violate the legal lending limit, and the appearance that the nominees were in fact obligated to repay the notes; when in effect, the concentration of funds and the obligation to repay in Robidoux and his interests did violate the legal lending limit and the nominees had not borrowed the funds nor obligated themselves to repay the funds borrowed in their names, thereby the defendants and co-conspirators did jeopardize the safety and soundness of Mohawk stockholder and depositor funds.

[7]The Ninth Circuit's decision in *United States* v. *Pollack*, 503 F.2d at 91, which seems to conflict with that court's conclusion in *Ramirez* on this point, is explained in *United States* v. *Morrison*, 536 F.2d 286, 288-289 & n.7 (9th Cir. 1976).

never requested a voir dire of the juror, so the claim depends upon a finding of plain error. And the essentially factual determination by both courts below that no prejudice occurred does not warrant further review by this Court.

In *Smith* v. *Phillips*, 455 U.S. 209, 215 (1982), this Court noted that "the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias." Here the district court conducted a hearing at which both the prosecutor and the FBI agent who spoke to the jury foreman were questioned. Petitioner's counsel was present, and did not ask to have the foreman questioned. Nor did he do so later, when he moved to dismiss the juror. Petitioner cannot now complain of the trial court's failure to conduct such an examination. As both courts below recognized, petitioner has simply failed to sustain his burden of proving that the juror was biased, or that anything improper occurred. A district court has considerable discretion in determining the scope and nature of the investigation needed to evaluate a claim of impermissible jury contact. *United States* v. *Doe*, 513 F.2d 709, 712 (1st Cir. 1975); *United States* v. *Almonte*, 594 F.2d 261, 266 (1st Cir. 1979); *United States* v. *Boscia*, 573 F.2d 827, 831 (3d Cir.), cert. denied, 436 U.S. 911 (1978); *United States* v. *Buchanan*, 633 F.2d 423 (5th Cir.), cert. denied, 451 U.S. 912 (1981). Indeed, no evidentiary hearing is necessary when communication with a juror is totally unrelated to matters pending at trial and no prima facie showing of prejudice is made. *United States* v. *Lubrano*, 529 F.2d 633, 638 (2d Cir. 1975), cert. denied, 429 U.S. 818 (1976); *United States* v. *Boscia*, 573 F.2d at 831. Here the district court concluded, after examining the FBI agent, that further inquiry was not warranted. Petitioner has not shown why that conclusion was erroneous. "[D]ue process does not require a new trial every time a juror has been placed in a potentially compromising situation." *Smith* v. *Phillips*, 455 U.S. at 217.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1983

DOJ-1983-11